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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CITY AND COUNTY OF DENVER,

Petitioner,

v.

C. KELLY CARPENTER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

On June 28, 1996 the City and County of Denver (hereinafter "Denver") filed its Petition for Writ of Certiorari. After filing its Petition Denver learned that on June 24, 1996 this Court granted the Petition for Writ of Certiorari in *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 64 USLW 3854 (US June 24, 1996) (No. 95-897).

The issues raised in Denver's Petition are substantially similar to those in *Auer v. Robbins*. Both cases involve interpretations of two of the United States Department of Labor's regulations: 1) its "salary basis" regulation (29 CFR § 541.118(a)), pertaining to whether an exempt employee's pay is "subject to reduction" based upon the mere possibility of a deduction, and 2) its "window of correction" regulation, 29 CFR § 541.118(a)(6). Thus, the Respondent's Brief in Opposition correctly states that "*Auer* raises the same two issues presented by the Petitioner in this case." (*Id.* at 2.)

I.

The Brief in Opposition is inaccurate in contending that *Auer* and the present case involve "key factual differences." *Auer*, like the present case, involves the primary issue of whether a mere "contingent possibility" of a deduction in salary defeats exempt status. *Id.* at 710. In *Auer* a one time, two-day deduction from the salary of one exempt employee (Sergeant Guzy) occurred as discipline for violation of St. Louis' residency requirement. *Id.* Sergeant Guzy, in lieu of possible termination, settled with the City, agreeing to waive his right to a hearing and to accept a two-day suspension without pay.

Contrary to the Respondent's contention, the disciplinary suspension in *Auer* was initiated pursuant to a City rule. As noted in the Petition for Writ of Certiorari in

Auer, the St. Louis Police Manual provided various penalties, including disciplinary suspension, which the plaintiffs were subject to.

In *Auer* the Eighth Circuit held that a one-time deduction "does not automatically require the determination that all sergeants are non-salaried." *Id.* at 710. It concluded that a one-time deduction, under the circumstances of the case, did not make that occurrence "pursuant to an established policy." *Id.* at 711.

Like *Auer*, in the present case the Tenth Circuit found that a disciplinary suspension had only occurred once, in the case of Lieutenant Dale Canino. *Carpenter v. City and County of Denver, Colorado*, 82 F.3d 353, 358 (10th Cir. 1986)[1]. However, as noted in the Appellee's Petition for Rehearing (pgs 13-14) Lieutenant Canino served a suspension, but only at the *non-exempt* rank of sergeant. Whether a disciplinary suspension of an exempt Denver employee never occurred, or occurred but once, there is no evidence that Denver had an express policy or a practice of docking pay, rather than accumulated leave.

In *Auer* and the present case, both Sergeant Guzy and Lieutenant Canino settled their personnel matters. Lieutenant Canino, as part of a settlement, accepted a sixty day suspension, in lieu of demotion, for falsifying time records. He also waived his right to bring any claims under the FLSA, by releasing and waiving all other causes of action "arising directly and indirectly from the administration of discipline in this case." Had voluntary settlements not occurred in Lieutenant Canino and Sergeant Guzy's cases, both would have unquestionably been considered at all times to have been salaried,

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[1] The only other discipline discussed in the *Carpenter* decision was that of Lieutenant Buckley Stewart who was suspended with pay. *Id.* at 358.

exempt employees, and neither St. Louis nor Denver would have suspended any exempt employee without pay.

Thus, as detailed above *Auer* and the present case are substantively indistinguishable.

The Respondents' contention that the courts of appeals are not split over whether salaried status is lost "where there is an express and implemented disciplinary rule" is incorrect, and misidentifies the basis upon which the split in the circuits has occurred. The split exists between those circuits, like the Eighth Circuit in *Auer*, which held that salary is not subject to reduction based upon the "mere possibility" or "contingent possibility" of reduction (*Id.* at 710), and those circuits, like the Tenth Circuit, which have ruled that such a possibility is sufficient. That issue is one of the primary issues presented in the Petition for Writ of Certiorari filed in *Auer*.

The Tenth Circuit's decision in *Carpenter* was premised on its conclusion that Denver's policy of "removing leave time from the officers' leave repository creates the potential for reducing pay." *Id.* at 359. It did not base its determination on the presence or absence of an express policy.

The Ninth Circuit's decision in *Barner v. City of Novato*, 17 F.3d 1256 (9th Cir. 1994), involved an "informal city policy" of either deducting employee absences of less than one day from unused leave time, or if the leave was exhausted, to leave to the city manager's discretion what to do. *Id.* at 1258. Thus, the City of Novato required two eventualities to occur before employee pay would be reduced.

The Ninth Circuit held that neither the possibility of reducing pay, nor the city's policy of reducing accrued paid leave for absences of less than one day, resulted in the plaintiffs' status being altered to that of hourly employees. *Id.* at 1261-1262. It further held that in the

absence of an express policy of subjecting "pay to reduction for absences of less than one day, deducting accrued leave time is not conduct which puts the employee outside the applicable exemption." *Id.* at 1258.

Denver notes that neither the City of Navoto, nor Denver, have an express policy of subjecting pay to reduction. Based upon the Respondents' thesis that the presence or absence of an express rule explains the outcome of the Courts of Appeals' decisions, the Tenth Circuit should have ruled in Denver's favor.

The Respondents also incorrectly contend that *Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993), involved no rule. However, a sick leave rule relied upon by the plaintiffs in that case provided that once leave credits and compensatory time were exhausted, their compensation was subject to reduction for absences of less than one day. *Id.* at 84. Denver again notes that the Sixth Circuit's ruling was not based upon whether an express or unimplemented policy existed.

Similarly, the Respondents' premise as to the decisions in *Atlanta Professional Firefighters Local 134 v. Atlanta*, 920 F.2d 800 (11th Cir. 1991), and *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993) is unavailing. The Eighth and Eleventh Circuits' rulings that exempt status was not lost turned on the absence of an actual loss of pay, rather than the issue of the presence or absence of an express or "unimplemented" rule.

II.

Both *Auer* and Denver's Petition raise the issue of whether the "window of correction" (29 CFR § 541.118(a)(6)) is available "for reasons other than lack of work". In *Auer* the Court held, that under the circumstances, it was, and that pursuant to the regulation, an

employer need only "reimburse the employee for the lost wages." *Id.* at 711. Thus, because the circumstances in *Auer* and this case closely parallel each other, reimbursement, pursuant to 29 CFR § 541.118(a)(6), would be a simple matter of paying at most one employee for his lost wages.[2]

The Respondents do not contest Denver's interpretation of the express language of the rule, but instead argue that Denver cannot "refuse to comply in the future" because it "cannot promise to ignore its own express policy". The Respondents' contention, however, ignores the fact that such a promise made by Denver would simply be a promise to *continue* its actual practice, which has never resulted in a loss of pay to any exempt employee.

CONCLUSION

For the reasons stated in Denver's Petition for Writ of Certiorari, and because that Petition involves substantially similar issues and factual circumstances to those in *Auer*, the Petition should be granted.

Respectfully submitted,

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[2] As noted above, Denver contends that the Tenth Circuit erred in finding that Lieutenant Canino received a suspension as an exempt employee.